UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

VESTA VFO, LLC,	:	
Respondent,	:	
and	:	**Case Nos. 04-CA-260273 and 04-CA-260277**
ANDREW DEFINIS	:	
and	:	
NICHOLAS DEFINIS	:	
Charging Parties.	:	

POST-HEARING BRIEF OF RESPONDENT

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Consistent with Section 102.42 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent Vesta VFO, LLC ("Respondent" or "Company") respectfully submits this Post-Hearing Brief. This matter is a consolidated case concerning two (2) unfair labor practice charges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the "Act" or "NLRA"). *See generally*, Consol. Am. Compl. ¶¶ 1-6.

I. FACTUAL BACKGROUND

In the Consolidated Amended Complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) by discharging Andrew Definis and Nicholas Definis ("Charging Parties") because they engaged in protected concerted activities for the purpose of mutual aid and protection "by discussing the compensation of Respondent's employees with each other and with Respondent and seeking to negotiate increased compensation for themselves." Contrary to the General Counsel's assertions, Respondent discharged Charging Parties for reasons wholly unrelated to any alleged protected activity – a breach of trust. More specifically, as expressly set forth on the script used for their discharge meeting, Respondent discharged Charging parties for searching for information they should not have. As an initial matter, Charging Parties' secretive search for confidential information is not protected activity under the Act. Furthermore, prior to Charging Parties' discharge, Respondent had engaged in compensation discussions with Charging Parties on numerous occasions, each time exhibiting no animus or displeasure toward Charging Parties.

It is undisputed that Respondent discharged Charging Parties only after it discovered that Charging Parties had engaged in a fishing expedition in its document management system, digging through layers upon layers of folders and subfolders to obtain confidential payroll information in a zipped file. As an entity operating in the financial services industry, Respondent handled sensitive and confidential client information in the normal course of business. Charging Parties' actions irreparably damaged any trust Respondent had in them and demonstrated poor judgment

and a complete lack of discretion with respect to their granted access to sensitive client information. Respondent determined that retaining Charging Parties as employees with access to clients' financial information was a risk too great to bear, leaving Respondent with no choice but to terminate their respective employment. Under these circumstances, as discussed in more detail below, the Consolidated Amended Complaint should be dismissed in its entirety.

A. Background of Vesta VFO

Respondent is no longer a going concern. When it was active, Respondent was one of several related business entities owned by Josh Coleman. These related entities are dedicated to providing advanced planning, insurance, and financial services to ultra-high net worth families, including to Josh Coleman. Each of the entities serves a purpose separate and distinct from the rest: Burtonvic Capital solely supports Josh Coleman and provides investment services to maintain and grow Josh Coleman's own assets; JJKC is a "family office"[1] that is hired by Burtonvic Capital to provide management services for Coleman Family assets; and Momentum Advanced Planning is a customer-facing entity that provides insurance and planning services to outside clients . (Tr. pp. 584:20-21; 586:22-23). Some of the entities' wealthier clients communicated the need for additional services, including help in setting up family offices of their own. (Tr. pp. 584:24-585:6). Respondent Vesta VFO—VFO stands for "virtual family office"—was established to meet this need and assist clients in setting up family offices for tax efficiency. (*Id.*). Family offices typically hire a Chief Investment Officer ("CIO"), not as part of Respondent or any of its related entities, to help manage the family's money by advising where to invest, such as in private companies, stocks

[1] A "family office" is a defined term in the financial industry to describe the business entities created to manage the assets of the ultra-wealthy rather than hiring a number of outside money managers. (Tr. pp. 585:2-6; 585:26-586:4).

and bonds, or other ventures, and, separately, hire an assistant to manage the family's assets, including houses, cars, and boats. (Tr. p. 586:5-16).

Respondent's function was to analyze potential investments from market participants to determine if it would be interesting to clients, potential clients or the Coleman family. (Tr. p. 481:9-12). Due to the nature of the services it provided, Respondent had access to the confidential information of clients and potential clients, including, but not limited to, tax returns, financial statements, and medical records. (Tr. pp. 481:4-6; 587:2-9). Respondent was subject to Securities Exchange Commission ("SEC") regulations, due to its relationship with Vesta Advisors, LLC ("Vesta Advisors"), which was, as an entity, a registered investment advisor. (Tr. p. 482:1-6). Josh Myers, formerly one of Respondent's management partners and head of its investment group, was a chartered financial analyst. (Tr. p. 482:4-6). Accordingly, he, as well as the people working underneath him, were required to meet standards of conduct imposed by the SEC. (*Id.*). Thus, Respondent required that its employees treat client information with the utmost care and maintain discretion, trustworthiness, and confidentiality. (Tr. p. 482:7-19). Respondent communicated these requirements to all employees through its employee handbook and, separately, through the Vesta Advisors compliance manual ("Compliance Manual"). (Tr. pp. 588:5-10; 482:7-11).

Respondent also utilized secure servers and other technologies to safeguard client information from external threats. (Tr. p. 588:15-24). "SharePoint" was the main document management system Respondent utilized, which allowed Respondent to set up a separate workspace[2] for each individual project and for Respondent's employees to collaborate on the same set of documents within those individual projects. (Tr. pp. 487:21-24). Management set

[2] Internally, each workspace was colloquially referred to as a "SharePoint." Thus, there were separate SharePoints for Respondent's various projects.

permissions for which employees would have access to which SharePoint and, to a much lesser extent, what the employee would be able to view within the SharePoint. (Tr. pp. 537:24-538:1).

B. Cunningham Project and iDeals Backup Files.

One of Respondent's investments was the Cunningham Project, which funded the drilling of a number of oil and gas fields located throughout Canada and West Virginia. However, Respondent ceased funding the project in February 2019 due to some suspected improprieties on the part of the business partner with whom Respondent was investing. (Tr. p. 597:20-25). By May 2019, Respondent ceased all work on the project due to the deterioration of the project and litigation related to the project that commenced on May 15, 2019.[3] (Tr. pp. 267:5-10; 388:1-2; 8-15; 390:7-31; 502:3-12; 598:4-11).

Respondent contracted with a document management platform, called "iDeals," to provide external server space separate from the main Cunningham SharePoint workspace specifically to satisfy Respondent's document preservation obligation in the pending litigation. (Tr. pp. 598:21-599:6). The iDeals server also provided access to Respondent's legal counsel to review documents, without requiring access to Respondent's SharePoint. (*Id.*). The documents uploaded by Respondent to iDeals were gathered in one of two ways: 1) they were voluntarily uploaded by employees who worked on the Cunningham Project, using documents already on the Cunningham SharePoint that the employees felt would be pertinent to the litigation; or 2) they were involuntarily pulled from employees' emails, chat files, and desktops through e-discovery software utilizing search terms. (Tr. pp. 600:23-601:16).

[3] *See Cunningham Energy, LLC v. Vesta O&G Holdings, LLC, et al*, S.D.W.V. No. 2:19-cv-00385.

Respondent's documents related to the Cunningham litigation were stored in the iDeals server space until November 2019, when Respondent chose to close down the iDeals space to save on monthly storage and excess usage fees. (Tr. pp. 601:24-602:8; Resp. Ex. 18). The litigation-related documents from iDeals were then backed up and saved to Respondent's Cunningham SharePoint (as "Cunningham iDeals Back Up 11-7-19"), where Respondent had unlimited data storage with no fee. (Tr. p. 602:5-9).[4] The documents pulled back onto Respondent's SharePoint maintained the same folder and subfolder structure as they originally possessed when uploaded to iDeals. (Tr. 602:24-603:7). Thus, if a document was stored within three subfolders when uploaded to iDeals, the Cunningham iDeals Backup maintained the same document within the same three subfolders, essentially as a one-to-one copy.

C. Early Stages of Charging Parties' Employment.

On January 2, 2019, Charging Parties signed offer letters from Respondent, stating that their employment with Respondent commenced on January 7, 2019, at an annual salary of $50,000. (Tr. pp. 140:5-141:13; Resp. Ex. 1). Prior to working for Respondent, Charging Parties collectively had little to no experience in the financial services industry. Andrew Definis worked for BNY Mellon for around six months in 2018. (Tr. pp. 136:18-137:4). Nicholas Definis never worked in the industry, with his exposure to the industry limited to a one-year unpaid internship with Temple University's Economics Department. (Tr. pp. 340:17-341:8). Both were unemployed at the time of their hire by Respondent. (Tr. pp. 136:24-137:1, 340:17-341:4).

[4] Due to the nature of the using search terms to gather potentially relevant documents and communications, numerous documents unrelated to the Cunningham Project were swept into iDeals for storage, as part of being overly inclusive for preservation obligation purposes. By November 7, 2019, the date of the close of the iDeals storage space, no one associated with Respondent had reviewed the results of the search terms search to eliminate any unrelated documents. As a result, and unknown to Respondent, numerous documents unrelated to the Cunningham Project were stored on iDeals and then pulled back into SharePoint.

Respondent maintained an Employee Handbook, and due to the SEC implications for Josh Myers as a chartered financial analyst, along with the team under him, a Compliance Manual. (Tr. p. 482:1-6). Respondent's employees, Charging Parties included, were required to acknowledge the receipt of, and abide by, Respondent's Employee Handbook and the Compliance Manual. Despite Charging Parties' assertions that they never received a copy of the Compliance Manual (Tr. pp. 292:22-25; 314:8-16), Respondent distributed the Compliance Manual, as well as Respondent's Code of Ethics, Privacy Policy, and Business Continuity and Disaster Recovery Plan, to Charging Parties and its other employees via email on May 15, 2019. (Resp. Ex. 21). Respondent instructed its employees that the SEC required its employees to review the policies and return a signed acknowledgement that the employees read the contents of the policies and procedures and agreed to abide by said policies and procedures. (*Id.*). Andrew Definis signed and returned his acknowledgement on May 22, 2019; Nicholas Definis signed and returned his acknowledgement on June 18, 2019. (Resp. Ex. 3; Tr. pp. 301:21-25; 426:2-14). Notably, the Compliance Manual provides, "No Associated Person may utilize property of the Company, or utilize the services of the Company or its Associated Persons, for his or her personal benefit or the benefit of another person or entity, without approval of the COO." (Resp. Ex. 2, RESP0007). It further provides, "Improper use of the Company's proprietary information, including Nonpublic Personal Information, is cause of disciplinary action up to and including termination of employment for cause…" (Resp. Ex. 2, RESP0008).

At the outset of their employment, Charging Parties reported directly to Justin Coleman and performed finance and financial accounting-related projects. (Tr. pp. 141:17-19; 344:15-20). The early parts of Charging Parties' employment focused on introducing them to the world of finance. (Tr. pp. 141:20-142:6). Charging Parties also worked on a couple long-term projects

early in their employment with Respondent: the aforementioned Cunningham Project; and the Strata Project, which was an investment in oil and gas fields in Texas and Louisiana. (Tr. pp. 77:7-14; 141:25-142:1). While Charging Parties continued to work on the Strata Project throughout their employment with Respondent, they ceased work on the Cunningham Project in May 2019. (Tr. pp. 200:12-19; 388:11-390:13).

D. Charging Parties' Transfer to Investment Team.

By the spring of 2019, Charging Parties began working with Josh Myers and Respondent's investment team and, at some point between May 2019 and the summer of 2019, Charging Parties began formally reporting to Myers. (Tr. pp. 143:4-7; 484:1-13). Andrew Definis testified that Respondent transferred Charging Parties to Myers' team because the Cunningham Project had ceased work and Charging Parties could assist on other investment projects. (Tr. p. 143:8-12). Charging Parties retained their "analyst" job titles despite the change in reporting structure. (Tr. p. 143:15-20).

Myers testified that Charging Parties were hard workers, but were inexperienced, very raw, and needed a lot of development. (Tr. p. 485:7-10). More specifically:

> And we were working on a model for a wood pellet plant, and we'd say, okay, this is what we want to do. This is what we want it to look like. They would be charged with doing it.
>
> We'd come back and there would be, you know, a lot of correction and things like that that we would do. Which is all normal in the course of this job, but there was just a lot of…hand-holding required. They weren't, in my opinion, and my experience…a senior analyst that you could give a job to, and they would go off and do it on their own without a lot of assistance.
>
> * * *
>
> I tried to avoid open-ended tasks as much as possible, just because of what I said before. You know, they were, they are more junior, so in general, you don't give your junior people open-ended tasks. You give them very finite, close-end tasks.

(Tr. p. 485:13-486:7). In addition to giving specific directives on what tasks to complete, Myers also issued directives on what *not* to do in order to save time and direct Charging Parties' focus. (Tr. p. 502:21-24). Issuing specific directives was also a focus of the team meetings led by Myers: "We did not have meetings where people were expected to know things. It was--we had meetings to accomplish things, oftentimes just delegating responsibilities." (Tr. p. 555:1-5).

Charging Parties performed a significant amount of research in the course of their employment, but most of this research was external to Respondent's document management system. (Tr. p. 657:3-17). While Myers expected Charging Parties to be aware of where relevant folders and documents were, he did not rely on Charging Parties for knowledge or information for what was stored in the SharePoint for any specific project. (Tr. pp. 487:13-488:3).

E. Charging Parties' Work on the Cunningham Project.

Early in their employment with Respondent, Charging Parties worked on the Cunningham Project. However, this work ceased around May 2019, after Respondent ceased funding the project and litigation commenced. (Tr. pp. 267:5-10; 388:1-2; 8-15; 390:7-31). To preserve documents potentially related to the litigation, Respondent instructed Charging Parties to upload all potentially relevant documents in their possession to the iDeals site for preservation and review by Respondent's legal counsel. (Tr. pp. 267:11-16; 388:8-389:2).

After Charging Parties transitioned to Josh Myers' team, there was a brief period where it appeared that the Cunningham litigation may settle and the project would resume. (Tr. pp. 502:13-20). Myers advised the investment team, including Charging Parties, that the project might be coming back up, but directed them not to do any work on the project at that point in time. (Tr. pp. 502:17-20; 556:7-11). On November 4, 2019, in furtherance of exploring a possible resolution of the Cunningham litigation, Myers asked Charging Parties to check whether a title search had been

performed on a piece of real property associated with the project. (Tr. p. 392:1-9; Resp. Ex. 17). Charging Parties provided Myers a copy of the title just minutes later. (Resp. Ex. 17). Myers did not ask Charging Parties to perform any other task related to the Cunningham Project any time after November 4, 2019. (Tr. pp. 206:24-207:7; 392:13-18; GC Ex. 7, p. 27).

F. Charging Parties' Relationship With Coworkers.

Throughout Charging Parties' time working under Josh Myers, they regularly complained about and denigrated other team members. Their complaints were often "cast in the light of they work harder than everyone else," and because of this, "they wanted a pay raise." (Tr. p. 495:18-20). On September 2, 2019, Charging Parties messaged Josh Myers, stating that their "roles and responsibilities are now so integral to the deal process that it has cut out the needs of others," and that coworkers Seth Morton and Jeremiah Lapp "provide no value in terms of what [Charging Parties] are responsible for." (Resp. Ex. 4, RESP0012). Charging Parties went on to state that "Jeremiah and Seth both strategically try to intercept [their] work between [Charging Parties] and Myers, [Josh] Coleman, and Rick [Cott]," but that Charging Parties "are not willing to forgo [their] value that [they] have worked so hard relentlessly to provide so others can justify their own." (Resp. Ex. 4, RESP0013).

Josh Myers testified that Charging Parties made these types of comments about coworkers frequently:

> Q. And how frequently did they talk negatively about the coworkers?
>
> A. Regularly, once a week, twice a week. There was (sic) emails, in person discussion, again, about team interaction, about pay, that are all just normal things in the investment industry.

(Tr. pp. 498:23-499:3). Andrew Definis added context to Charging Parties' feelings, stating that "it was just a professional disagreement within the workplace because our value was being subverted." (Tr. p. 164:20-22).

G. Charging Parties' History of Compensation Discussions.

Charging Parties engaged in a series of conversations with Respondent concerning their compensation during their employment. Charging Parties engaged in the first of these conversations with Justin Coleman in March 2019, just two months after they began their employment. (Tr. pp. 89:20-90:9; 350:16-351:15). They again discussed their compensation with Justin Coleman in or around July or August 2019. (Tr. pp. 90:19-91:3; 352:10-13; 353:10-24). Aside from these two, more detailed discussions, Charging Parties had compensation discussions with Justin Coleman in passing "more than a handful of times," prior to their transfer to Josh Myers' team. (Tr. pp. 154:25-156:16; 352:5-9). Charging Parties admit that Justin Coleman never demonstrated that he was upset or displeased by their discussions about Charging Parties' pay. (Tr. pp. 156:13-22; 358:6-11).

Charging Parties redirected their compensation discussions to Josh Myers, once they began reporting directly to Myers. On October 13, 2019, Charging Parties sent a message to Josh Myers concerning their compensation, stating that they were "grossly underpaid" and that they have knowledge of other employees' compensation. (Tr. pp. 166:8-10; 360:3-9; 507:1-8; Resp. Ex. 6, RESP0017). Charging Parties testified that their knowledge of others' salaries came from supervisors, managers, and executives offhandedly discussing people's compensation around the workplace. (Tr. pp. 167:7-10; 169:18-20; 171:23-25; 361:5-8). In response to Charging Parties' message concerning their compensation, Myers responded that a formal compensation discussion would come at the end of the year and that Myers was making one-third of what he had been

making prior to joining Respondent. (Resp. Ex. 6, RESP0018). Charging Parties admit that Myers did not take issue with them knowing other employees' compensation. (Tr. pp. 175:21-24; 508:1-15).

H. Charging Parties' Search for Confidential Information and the Final Pay Discussion.

On December 3, 2019, around 3:06 p.m., Andrew Definis emailed Nicholas a confidential document belonging to Respondent that reflected Respondent's payroll and its employees' respective salaries. (Tr. p. 103:11-15; Resp. Ex. 8, RESP0041). Andrew found the payroll document on the Cunningham SharePoint, in the zip folder labeled "Cunningham iDeals Backup 11-7-19," and within 11 layers of folders and subfolders, including a folder specifically labeled "Justin Coleman." (Tr. pp. 101:5-9; 613:6-618:16; Resp. Ex. 19). After finding the payroll document, Andrew continued to access personal documents belonging to Justin Coleman, including the bill of sale on his residence. (Tr. pp. 218:12-16; 276:2-6). Andrew went even further by accessing all of the zip folders labeled with the names of other Vesta employees or the Colemans themselves. (Tr. pp. 220:1-6; 203:4-24). A little more than twenty minutes after Andrew Definis sent Nicholas the confidential payroll document, at 3:27 p.m., Andrew also sent Nicholas the file path that would take him to the zip folders labeled with the names of all the Vesta employees and the Colemans themselves. (Resp. Ex. 8, RESP0042).

Around six hours after Andrew shared the payroll document and labeled zip folders with Nicholas, Charging Parties sent a message to Josh Myers noting that some items had come to their attention and that they were looking to connect with Myers to discuss their compensation. (Tr. p. 107:7-22; Resp. Ex. 8, RESP0034). Neither Andrew nor Nicholas told Josh Myers that a payroll document, nor any other personal documents, had been mistakenly uploaded, where the documents

were, nor attached the documents to the email to Josh Myers. (Tr. p. 107:23-25; 404:1-4; 407:18-21; Resp. Ex. 8, RESP0034).

On the morning of December 4, 2019, at 9:18 a.m., around eighteen hours after Andrew initially shared the payroll document with Nicholas, Charging Parties messaged Justin Coleman—for the first time since finding the payroll document within Justin Coleman's personal Chat Messages on the SharePoint—to alert him to the fact that "files of [his]" were uploaded to the SharePoint that should not be. (Resp. Ex. 8, RESP0035). According to Charging Parties' own testimony, Charging Parties admit that this message referred to all of Justin Coleman's personal documents, as well as the loaded payroll document. (Tr. pp. 102:22-103:15). However, at the time they messaged Justin Coleman, Charging Parties did *not* inform him exactly what the files were, where the files were located, or state that they had viewed documents belonging to him that were of a personal nature. (Tr. pp. 411:12-18; Resp. Ex. 8, RESP0035).

Shortly after Charging Parties sent their message to Justin Coleman, Josh Myers, upon arriving at work that morning, entered Charging Parties' workspace to follow up on the message he received from the Charging Parties the prior night. (Tr. pp. 110:18-22; 407:4-13; 511:5-9). Charging Parties informed Myers that they found a payroll document on the SharePoint, they were unhappy about their pay, and they were upset with knowing they were the lowest paid employees at Respondent, all part of yet another compensation discussion with Myers in which Myers informed Charging Parties that a formal compensation discussion would come at the end of the year after performance reviews. (Tr. pp. 110:24-112:12; 421:9-424:7; 511:16-512:21). However, Charging Parties did not tell Myers *how or where* they found the document, or that there were other, personal documents also uploaded to the SharePoint. (Tr. pp. 512:22-513:2). Myers confirmed that Charging Parties had informed Justin Coleman that confidential information was

on the SharePoint. (Tr. pp. 421:13-16; 514:20-22). Myers did not express any displeasure with Charging Parties for the discussion about compensation. (Tr. pp. 419:19-21; 515:3-6). Myers also exhibited compassion and shared with Charging Parties his own experience of learning a colleague's salary and the hurt feelings that came along with it. (Tr. pp. 513:18-514:9).

I. Termination of Charging Parties' Employment.

After Charging Parties finally informed Justin Coleman that the payroll document was mistakenly uploaded to the Cunningham SharePoint, Respondent spent hours trying to find the document and lock down any misplaced confidential information. (Tr. p. 515:7-24; Resp. Ex. 10). Around 1:09 p.m. on December 4, Justin Coleman responded to Charging Parties' message by asking where on the Cunningham SharePoint the files were mistakenly uploaded. (Resp. Ex. 8, RESP0036). Nicholas Definis responded at 1:10 p.m., and again rather than informing Justin Coleman what files were uploaded or the specific location of the files (e.g., by cutting and pasting the file path message he had received from Andrew the prior day), he simply told Justin Coleman that the files were in "Cunningham App + Canada," one of the higher level folders. (Resp. Ex. 8, RESP0038; Resp. Ex. 19, RESP0081). Josh Coleman finally located the document around 1:28 p.m. and discovered that Charging Parties had to download the contents of the zip files within the Cunningham iDeals Back Up in order to access the loaded payroll document. (Resp. Ex. 10, RESP0046-0049). At 2:05 p.m., Justin Coleman messaged Charging Parties and, understanding that they had to download the zipped files to access the documents, asked them to delete the entire Cunningham iDeals backup file from their hard drives. (Resp. Ex. 8, RESP0039). Andrew Definis acknowledged Justin Coleman's request and responded that Charging Parties would delete the files from their hard drives. (Resp. Ex. 8, RESP0040).

Around this same time, on December 4, 2019, Josh Myers met in person with Josh Coleman and Coleman explained to Myers that the documents accessed by Charging Parties were in a very remote location on the SharePoint, that his family's personal documents were in the location, that Charging Parties looked through the documents, and that Coleman felt violated as a result. (Tr. pp. 515:12-516:11). Prior to his conversation with Josh Coleman, Josh Myers was under the impression that Charging Parties simply stumbled across the payroll document, a sentiment shared by Justin Coleman. (Tr. p. 519:21-23). Based on this assumption, Justin Coleman made uninformed proposals to the other members of management how to handle the Charging Parties' actions, including their behavior toward coworkers, and what actions Charging Parties would need to take to increase their salaries. (Resp. Ex. 10, RESP0051). Management for Respondent called a meeting to be held on the afternoon of December 5, 2019, to discuss the potential consequences associated with the personal data misplaced on the SharePoint and what, if any, actions should be taken with respect to Charging Parties. (Tr. pp. 519:2-20; 619:21-24). Ahead of the December 5 management meeting, and parallel to and separate from anything Justin Coleman may have been assuming, a visibly upset Josh Coleman approached Tom Povedano, Respondent's COO, and asked whether Povedano saw exactly *how* Charging Parties accessed the loaded payroll document. (Tr. p. 607:18-20). Understanding that Josh Coleman was not just the owner of Respondent, but also one of its few clients, Povedano took the time to investigate the Cunningham SharePoint and discovered the lengths to which Charging Parties had to go to find the loaded payroll document, as well as the other personal documents uploaded to the SharePoint from the Ideals backup. (Tr. p. 607:24-25; 620:19-20; Resp. Ex. 19). Povedano demonstrated this aspect of his investigation into Charging Parties' misconduct during the hearing itself. (Tr. pp. 613:6-618:17).

Present at the December 5 meeting were Josh Myers, Josh Coleman, Justin Coleman, and Tom Povedano. (Tr. p. 620:4-8). In the meeting, Povedano and Josh Coleman explained and exhibited to Myers and Justin Coleman the lengths to which Charging Parties had gone to find and access the personal documents, including the loaded payroll document. (Tr. pp. 621:1-6). As Povedano testified:

> I suggested we had a major data breach. If this had happened to any of our other clients, we'd be liable for serious penalties. And the efforts that the boys took to go through, I thought, put us at tremendous risk in the future business.

(Tr. p. 621:2-5). It was at this point that Myers and Justin Coleman understood the gravity of the situation. As Myers testified:

> You know, for me, that was when it really became -- I became aware of, you know, how they accessed the information and the level of…inappropriateness of it. So we just talked about where [the payroll document] was…why would they be in this location if we did not ask them to look for [anything]. You know, the fact that it was a zip file. The fact that it was multiple layers down into the zip file.
>
> It became clear that -- it seemed like they were looking for something instead of just stumbling across something. As we discussed the implications of that, the consequences of that. You know, the fact that we have a lot of confidential client information and that we really need to be able to trust all our employees and the severity of this.

(Tr. p. 519:4-16). The meeting concluded with management deciding to adjourn for the day, taking the night to give the situation more thought and reconvene on December 6, 2019, to make a final decision. (Tr. pp. 520:6-9; 621:10-12).

On the morning of December 6, 2019, management reconvened and collectively determined that Charging Parties breached Respondent's trust irrevocably, requiring termination of their employment. (Tr. pp. 520:25-521:9; 621:23-622:9). Josh Myers provided additional context to the decision, stating:

> A breach of trust with Nick and Andrew…is confusing because it's in a digital realm….A good analogy is there was an office door open, Gregg left the door open,

> there was confidential information in Gregg's desk or whoever's desk in the drawers.
>
> Would I -- would I terminate Gregg for breach of trust for leaving his door unlocked? No. Would I -- would I terminate an employee for breach of trust for walking into the office knowing that they shouldn't be in that office, opening the drawers, rooting through the files, pulling out specific information? Essentially, yes, those actions were the breach of trust that we decided as a management team.

(Tr. p. 539:1-13). Management determined that Josh Meyers would deliver the termination of Charging Parties' employment and that Sagar Dalal, Respondent's assistant general counsel, would serve as a witness. (Tr. p. 521:9-11). Josh Myers' notes from the December 6 management meeting, which he prepared during the meeting itself, expressly set forth Respondent's management team's agreed upon reasons for the termination of Charging Parties' employment:

1. Search for information they should not have
2. What they did with that information
    a. We have lost trust with you and that is the reason for the termination
3. Terminate for cause and they get unemployment.

(Resp. Ex. 14). Then, in order to give Charging Parties a path forward in their careers, without having a "for cause" discharge on their records, Myers, with the assistance of the other members of management, drafted a script to use during the termination meeting itself:

1. Earlier this week, you gained access to information you should not have, and what you did with that information has caused us to lose trust with you and as a result we have the right to terminate you for cause.
2. We are willing to offer you the option to be laid off which allow [sic] you to collect unemployment and not have this termination for cause on your permanent record. If you choose that option we will require you to sign a release and you will be able to collect two weeks' worth of base pay as severance.

(*Id.*; Tr. pp. 521:19-523:5; 623:21-624:1).

Later that day, on December 6, 2019, Josh Myers and Sagar Dalal met with Charging Parties and delivered the termination of their employment. (Tr. pp. 326:16-25; 447:20-448:22; 523:14-21). Myers, using the script as his guide, detailed Respondent's reasons for terminating Charging Parties' employment. (Tr. pp. 115:21; 448:1-7; 524:4-6; Resp. Ex. 14). He informed them that they searched for information they should not have, breached Respondent's trust, and, accordingly, Respondent was terminating their employment. (Resp. Ex. 14; Tr. pp. 326:8-13; 448:19-449:11; 524:19-21). Simultaneous with the termination meeting, Respondent had the head of its IT department cut Charging Parties' access to their emails and Respondent's document management system and physically secure their laptops, all to prevent any potential further data breach from Charging Parties' breach of trust. (Tr. pp. 622:12-17; 655:10-22). Following Charging Parties' discharge, Respondent, through its IT consultant, reviewed emails and Teams chat messages exchanged by Charging Parties through their company-assigned accounts, which revealed that Charging Parties had been searching for confidential information in Respondent's files at least as early as December 1, 2019. (Tr. pp. 547:18-548-8; Resp. Ex. 8, RESP0033).

II. LEGAL ARGUMENT

A. Legal Standard

The standard established in *Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) applies to Charging Parties' claims under Section 8(a)(1). In cases where a discharged employee alleges that his former employer violated Section 8(a)(1) of the Act, the Board assesses the employee's claim using one of two tests. If the employee was discharged due to misconduct that arises out of the employee's protected activity itself, the Board assesses the employee's 8(a)(1) claim under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 85 S.Ct. 171 (1964). Alternatively, where an employer

argues, as Respondent does here, that it discharged an employee for reasons unrelated to his protected activity, the Board applies the analytical framework set out in *Wright Line*; *see MCPC, Inc. v. NLRB*, 813 F.3d 475 (3d Cir. 2016) (court affirmed Board's determination that *Wright Line* test applies instead of *Burnup & Sims* where employer contends it terminated employee for allegedly obtaining confidential files in advance of any protected activity).

Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that (a) the employee was engaged in protected concerted activity; (b) the employer had knowledge of that activity; (c) the employer harbored animus against the activity; and (d) there is a causal link between the adverse action taken and the employer's alleged animus toward the protected activity. If, and only if, the General Counsel establishes a *prima facie* case, the burden shifts to the employer to establish that it would have taken the same action even in the absence of protected conduct. *Wright Line*, 251 N.L.R.B. at 1089. If the employer makes such a showing, the burden shifts back to the General Counsel to prove that the employer's proffered justifications are pretextual. *Id.* at 1096 (citing *NLRB v. Symons Manufacturing Co.*, 328 F.2d 835, 837 (7th Cir. 1964) and *NLRB v. Solo Cup Co.*, 237 F.2d 521, 525 (8th Cir. 1956)).

B. The General Counsel Cannot Establish a *Prima Facie* Case Under *Wright Line*.

No *prima facie* case exists because the General Counsel has not, and cannot, demonstrate the third or fourth prongs of its *prima facie* case under the *Wright Line* test.[5] Charging Parties admit that they discussed their compensation with Respondent on numerous occasions throughout their employment and that Respondent never exhibited any animus or displeasure toward them as

[5] Based upon the Consolidated Complaint, the General Counsel's introduced exhibits, and the General Counsel's opening statement, it is Respondent's understanding that the General Counsel alleges that Charging Parties' compensation discussions were their protected concerted activity. (Tr. pp. 32:16-19, 33:9-11, 49:18-20; GC Exs. 17, 19-20).

a result of any pay-related conversations. Additionally, the General Counsel also has failed to show that Charging Parties' discharge was caused by any animus related to their protected concerted activity. Charging Parties admit that, in the termination meeting, Respondent communicated that Charging Parties' breach of Respondent's trust was the reason for their discharge.

1. The General Counsel Has Failed to Establish Animus Toward Charging Parties' Compensation Discussions.

No record evidence exists establishing that Respondent had any animus toward Charging Parties' protected concerted activity. As set forth in the Consolidated Amended Complaint, the General Counsel argues that Respondent exhibited animus toward Charging Parties' compensation discussion purely due to the temporal proximity between their December 4, 2019 compensation discussion with Josh Myers and their discharges.[6] Indeed, no other evidence was established throughout the three-day hearing. General Counsel's reliance on temporal proximity fails for the simple reason that Charging Parties had a number of compensation discussions with Respondent throughout their employment and they admit that Respondent never exhibited any displeasure toward them following any of the previous discussions. Charging Parties testified that they had

[6] *See* Paragraph 4 of the Consolidated Amended Complaint, which reads:

(a) On December 3 and 4, 2019, Respondent's employees Andrew DeFinis and Nicholas DeFinis engaged in protected concerted activity for the purposes of mutual aid and protection by discussing the compensation of Respondent's employees with each other and with Respondent and seeking to negotiate increased compensation for themselves.

(b) About December 6, 2019, Respondent discharged Andrew Definis and Nicholas Definis.

(c) Respondent engaged in the conduct described above in subparagraph (b) because Andrew and Nicholas DeFinis engaged in the conduct described above in subparagraph (a), and to discourage employees from engaging in these or other concerted activities.

compensation discussions with their former manager Justin Coleman in March 2019, July or August 2019, and "more than a handful" of other informal discussions. (Tr. pp. 89:20-91:3; 154:25-156:16; 350:16-352:13; 353:10-24). Charging Parties admit that Justin Coleman never demonstrated that he was upset or displeased by their discussions about Charging Parties' pay. (Tr. pp. 156:13-22; 358:6-11).

Charging Parties also sent written communication to their then-manager Josh Myers on October 13, 2019, stating that they were "grossly underpaid" and that they had knowledge of other employees' salaries. (Tr. pp. 166:8-10; 360:3-9; 507:1-8; Resp. Ex. 6). The record clearly shows that Myers simply reassured Charging Parties that they would have a formal discussion about their compensation at the end of the year following performance reviews. (Resp. Ex. 6). Further, Charging Parties admit that Myers was not upset that they requested a pay raise. (Tr. pp. 175:21-24; 508:1-15). In fact, Myers accepted Charging Parties' request as part of managing workers in the investment industry:

> There was emails, in person discussion, again, about team interaction, about pay, that are just all normal things in the investment industry. It's a highly competitive industry, and people work hard and want to get ahead.
>
> * * *
>
> And so I saw these two young guys, very hard workers, and -- that needed a lot of guidance and coaching. And they were sort of, you know, saying look we want to get paid more. We think we're better than these people over here. Again all very normal things.

(Tr. p. 498:25-499:18).

Charging Parties even referenced the fact that they had knowledge of other employees' salaries; knowledge they testified was a result of management regularly speaking about employee compensation around the office. (Tr. pp. 167:7-10; 169:18-20; 171:23-25; 361:5-8). Charging

Parties also admit that Respondent never counseled, disciplined, or otherwise reprimanded them following any of these compensation discussions. (Tr. pp. 113:22-114:6).

That management would openly discuss compensation while in Charging Parties' presence, and the fact that Respondent never reprimanded Charging Parties for any of their prior discussions about pay, directly evidences Respondent's *lack of* animus toward Charging Parties' efforts to obtain greater pay. In fact, Charging Parties admit that, during the December 4 pay discussion, the discussion that the General Counsel argues led to Charging Parties' discharges, Josh Myers understood their frustration and even shared his own story about finding out about another employee's pay. (Tr. pp. 214:14-21; 420:4-10).

Consequently, there is no evidence on the record of any animus by Respondent related to any protected activity such that the General Counsel can demonstrate a *prima facie* case of an 8(a)(1) violation.

2. The General Counsel Has Failed to Establish a Causal Connection.

The General Counsel also cannot establish any causal connection between the alleged animus toward Charging Parties' protected activity and the decision to discharge Charging Parties. Absent animus, there can be no causal link between such absent animus and Charging Parties' efforts to secure a pay raise. While the General Counsel will argue that temporal proximity alone will constitute a causal link, as demonstrated above, Charging Parties admit that, prior to their December 4 pay discussion with Josh Myers, they engaged in numerous discussions concerning their pay and each discussion came and went without incident. Charging Parties also admit that they had never been disciplined or otherwise reprimanded prior to Respondent discharging them as a result of their breach of Respondent's trust. Indeed, the difference between the aftermath of the December 4 pay discussion and all of the prior pay discussions was that Respondent learned

of Charging Parties' fishing expedition to access confidential documents wholly unrelated to Charging Parties' assigned tasks. Such discovery by Respondent occurred *after* the last pay discussion, and *before* Charging Parties' discharges. *See Gaylord Hospital and Jeanine Connelly*, 359 NLRB 1266, 1279 (2013) (temporal proximity of claimant's protected concerted activity and her discharge not sufficient to establish causation where claimant's poor performance was an intervening event that ultimately engendered her discharge). Moreover, the balance of the evidence weighs against a finding of causation regardless of any temporal proximity. *See Gaylord Hospital* at 1279 ("In any event, the temporal proximity of the two events is insufficient to establish some sort of causal relationship, given the evidence overall to the contrary).

Consequently, because the General Counsel cannot establish causation, in addition to the lack of any evidence of animus, as part of its *prima facie* case, the Consolidated Amended Complaint should be dismissed.

C. Respondent Would Have Discharged Charging Parties for Breach of Trust, Even in the Absence of Any Protected Concerted Activity.

Even assuming the General Counsel is able to establish a *prima facie* case, which it cannot, Respondent has established that it would have terminated Charging Parties' employment for their breach of trust, even in the absence of their alleged protected concerted activity. Federal courts have established that in cases where the General Counsel asserts an 8(a)(1) violation, if the employer took action due to alleged employee misconduct, and said misconduct is disputed, the trier of fact must determine whether the employer had a good faith belief the misconduct occurred. *Sutter East Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 435 (D.C. Cir. 2012). Unlike under *Burnup & Sims*, where the General Counsel can also demonstrate an 8(a)(1) violation if it can show that the discharged employee did not engage in any misconduct, 379 U.S. at 23, an employer who holds a good-faith belief that an employee engaged in misconduct has met its burden under *Wright Line*,

even if the employer is ultimately mistaken. *Sutter East Bay Hosps.*, 687 F.3d. at 434 (citing *DTR Indus., Inc.*, 350 N.L.R.B. 1132, 1137 (2007)).

On the morning of December 4, 2019, in the midst of yet another discussion concerning their compensation, Charging Parties informed Josh Myers that they found a payroll document among Justin Coleman's files on Respondent's document management system. (Tr. pp. 110:24-112:12; 421:9-424:7; 511:16-512:21). Charging Parties also informed Justin Coleman that "some of his files" were on the Cunningham SharePoint where they should not have been. (Resp. Ex. 8, RESP0035). Notably, Charging Parties were intentionally vague and did not tell Justin Coleman what the files were, nor where on the Cunningham SharePoint they were located. (Tr. pp. 411:12-18; Resp. Ex. 8, RESP0035). Further, once Justin Coleman asked where the files were, Charging Parties were equally evasive in their response by simply providing Justin with a high-level folder location. (Resp. Ex. 8, RESP0038). Given the structure of the folders, this was akin to asking for a person's address and receiving solely the state in which he lives.

As Respondent searched for the information referenced by Charging Parties, management came to realize that Charging Parties had not simply stumbled across information. Instead, management discovered that in order to have accessed the payroll information, Charging Parties had to have downloaded the entire Cunningham iDeals Back Up file and rooted through layers upon layers of folders containing confidential documents related to the Coleman Family, who were not just Respondent's owners, but Josh Coleman was one of its few clients as well. (Tr. p. 607: 24-25; 620:19-20; Resp. Ex. 19). Furthermore, Charging Parties had no legitimate reason to search through the Cunningham iDeals file, a file that was related to an inactive project and was created specifically for the impending litigation related to the Cunningham project. (Tr. pp. 200:2-201:2).

These actions breached Respondent's trust and, due to the lengths to which Charging Parties searched for the payroll information they uncovered, Respondent discharged Charging Parties. (Tr. p. 537:1-5). Charging Parties admit that, during the discharge meeting, the only reason they were given for their discharge was their breach of Respondent's trust. (Tr. pp. 115:15-19; 326:8-13). Charging Parties also admit that Josh Myers read from a script to communicate the reasons for their discharge, a script that clearly denotes that Charging Parties' search for information was the reason for the termination of their employment. (Tr. p. 115:20-21; Resp. Ex. 14). Such misconduct constitutes legitimate and nondiscriminatory reasons for the discharges. *See*, *e.g. Roadway Exp.*, 271 NLRB 1238, (1984), and *Bullock's*, 251 NLRB 82 (1980).

In *Roadway Exp.*, the Board overturned an administrative law judge's finding that a discharged employee was engaged in protected concerted activity when he surreptitiously took bills of lading from his employer's files and distributed them to his union. In making this determination, the Board considered that the bills were kept in files in an office with limited access and also considered that the bills of lading were not obtained by the employee "in the normal course of work activity and association." *Id.* at 1239. "Rather, [the employee] went beyond the normal scope of his employment and took the bills of lading from the Respondent's files and copied them for reasons other than the Respondent's business purposes and without any approval or authorization by the Respondent….Such conduct is not protected under the Act." *Id. See also*, *Bullock's* (employer did not violate Section 8(a)(1) when it discharged employee for surreptitiously obtaining personnel interview reports and disseminating their contents).

Consequently, Respondent has established that it would have discharged Charging Parties for a breach of trust even in the absence of their compensation discussions.

D. The General Counsel Cannot Prove that Respondent's Reasons for the Discharges Were Pretextual.

Finally, the General Counsel cannot show that Respondent's actions were mere pretext for unlawful discrimination against Charging Parties for their protected concerted activity. As discussed above, the General Counsel's reliance on temporal proximity does not establish causation, much less pretext. As stated above, temporal proximity alone is not sufficient to demonstrate that an employer's termination of an employee is impermissible when there is an intervening event that led to the termination or where the balance of the evidence does not support causation. *See Gaylord Hospital*, 359 NLRB at 1279.

In addition, the General Counsel will likely argue that Respondent's actions were pretextual based upon: 1) Charging Parties' self-serving, incredible testimony that they did not engage in any form of misconduct, allegedly coming across the loaded payroll document while performing a "deep dive" into Cunningham at the suggestion of Josh Myers and Bill Coleman as part of their wide latitude to work as they saw fit; 2) Respondent's allegedly insufficient investigation of Charging Parties' misconduct; and 3) Respondent's purported inconsistent reasons for terminating Charging Parties' employment, based on a contrived interpretation of testimony from unemployment hearings taking answers to questions out of the general context in which they were made. As addressed in more detail below, these additional attempts to paint Respondent's actions as pretextual are unconvincing.

1. The General Counsel Has Failed to Establish Pretext Due to Any Absence of Misconduct

The General Counsel will likely argue that Charging Parties did not actually commit any misconduct and that they, in fact, merely stumbled upon the payroll document while attempting to be proactive. However, as discussed above, *Wright Line*'s progeny clearly establishes that an

employer need only have a good faith belief that such misconduct occurred and acted upon that good faith belief. *Sutter East Bay Hosps.*, 687 F.3d at 435. Considering the facts on the record—the extent of Charging Parties' search, the vague communications with Respondent, and the shifting justifications for searching a litigation file for an inactive project that they offered during testimony —it is clear that Respondent had a good faith belief that Charging Parties engaged in misconduct.

Andrew Definis testified that, in early November 2019, Josh Myers and Bill Coleman both approached Charging Parties about digging into the Cunningham Project because the project may be coming back online. (Tr. pp. 97:22-98:2). He testified that, on December 3, 2019, he was in the midst of that deep dive at Josh Myers and Bill Coleman's behest:

> Q. Was there a specific document that you were looking for on that date with respect to the Cunningham project?
>
> A. No. *Keeping up to date with the project itself, you have to have fresh knowledge. You might get called into the room in five minutes from then.* It's -- there wasn't ever -- there would just be like I said there were fire drills throughout the year. We need you right now. Come in the other room. Tell us about this, tell us about these separate aspects of this deal. And with keeping in mind that this might be -- that this is a high probability of coming back on line. You have to be fresh with it. You can't just say well, I haven't looked at it in a while. They want you to know.
>
> Q. Any other reason why -- any other explanation for why you were looking in that specific file that day --
>
> A. No.

(Tr. p. 195:7-22) (emphasis added). Andrew Definis further testified that during this deep dive, he was looking for the most recent information related to the Cunningham project, which led him to download a zip file titled "iDeals Data Room Back Up (11-7-19)":

> A. For that in my mind was that it was the most relevant, most current up to date information to get acquainted with to be able to work on this deal again when they needed me.

Q. What would lead you to that conclusion?

A. Because it was on the SharePoint and it was the most recent document.

Q. What tells you that it was the most recent document?

A. Because it said 11/7/19, it was within that -- I guess it would be the month span.

(Tr. pp. 223:25-224:8).

However, this testimony is inconsistent with Andrew Definis' other sworn statements and is heavily outweighed by the balance of the evidence. It is undisputed that the Cunningham Project was not active at the time Andrew embarked on his deep dive, and, in fact, had not been since May 2019. Because the project was inactive, Josh Myers directly instructed Charging Parties *not* to do any work on the project without further instructions. (Tr. p. 556:1-11). Andrew also testified at hearing, just as he testified at Nicholas Definis' unemployment compensation appeals hearing, that the only specific instruction Charging Parties received from Josh Myers related to the Cunningham Project was a November 4, 2019 request for a deed to a piece of real property associated with the project. (Tr. pp. 206:24-207:7; GC Ex. 7, p. 31).[7] Furthermore, on December 3, 2019, the date Charging Parties found the loaded payroll document, Respondent's efforts were wholly dedicated, or at least supposed to be wholly dedicated, toward the Strata Project and preparing to take it to market. Notably, Andrew testified:

Q. If we were to go back to your affidavit that you submitted to the Board…your affidavit referred to finding the payroll document and that you had not notified Justin [Coleman] until the next day because you were consumed in another project, which you've now testified to was the Strata deal, correct?

A. Yes.

[7] Andrew Definis also provided inconsistent testimony with respect to who allegedly instructed Charging Parties that the Cunningham Project was back on, stating during Nicholas Definis' unemployment compensation appeals hearing that Justin Coleman, not Josh Myers or Bill Coleman, informed Charging Parties that the Project was being resurrected. (GC Ex. 7, p. 30).

> Q. And so now your testimony is that you didn't inform Justin Coleman because of (sic) the next day because you were informing him about the bill of sale agreement, not the payroll document, correct?
>
> A. I notified him about the bill of sale document and that we were busy with Strata….Strata was going to be taken to market that week, and we were working on that up to the -- I believe we were still even tinkering with the model.

(Tr. pp. 285:20-286:20).

Nicholas Definis added that, on December 3, he was going through the Strata model in detail at the time, making final preparations for presenting a project on which Charging Parties had been working all year:

> Q. Were you also able to access the payroll document?...
>
> A. No. I was able to access the data room. You know what; when we were -- he had sent it to me, **I was so caught up in work for something else** that when he sent it to me, I acknowledged it….He sent it to me and I didn't spend too much effort other than saying, oh, where was that?
>
> And then I went to the SharePoint, saw that it -- he referenced to it was on the Cunningham Ideals file. And then I kind of like haphazardly tried to click that file, meaning like gave it some attention….
>
> Q. What kind of -- what were you working on at the time, if you recall?
>
> A. I was making sure that, basically the numbers in the model were correct for Strata and that the presentation had the right, basically, terms and details. **So I was going through it with a fine-tooth comb because we were asked to present**. **You know, we were going to wrap that up as a presentation. And, you know, I had worked on it all year**, so I understood a lot of the details and I just wanted to make sure that it was, you know, presented correctly and accurately….And you're under the gun, you king of pressure to make sure it's correct and to get it out the door.

(Tr. pp. 322:18-323:23) (emphasis added). Nicholas also testified that Strata had been "all-consuming" throughout 2019:

> Q. Would you agree that the Strata deal was a work-intensive, very involved project the end of November/beginning of December 2019?
>
> A. That, but also, to be honest with you, all year. I mean, worked my behind off on that way before even November/December. So yes, I would agree with you on November/December.

Q. Do you recall that there was going to be a presentation on Strata towards the end of the first week of December of 2019?

A. Yes.

Q. And that the team was working diligently to ensure that the presentation went off as best as possible?

A. Yes.

Q. And by the team, that would include both you and your brother working on that presentation? Would that be correct?

A. Yes, sir.

(Tr. pp. 379:18-380:9).

Moreover, it was readily apparent that the documents and information within the Cunningham iDeals Backup zipped folder all dated back to at least June 2019. Respondent produced evidence of the file structure of the Cunningham iDeals Backup file as it existed at the time Andrew Definis accessed the loaded payroll document. (Resp. Ex. 19). Andrew Definis admitted that the file structure depicted in Respondent's Exhibit 19 was an accurate representation of the file structure he accessed on December 3, 2019:

Q. And my question to you, Mr. DeFinis, if you go on [Resp. Ex. 19, RESP0102] and the next page, 103, and continue on through 104, would you agree that that accurately reflects the contents that was in the Teams chat file for Justin Coleman where you found the payroll document that you previously testified to?

A. Sorry, this is a little hard to see -- okay, I see it.

Q. And you see that there is the Excel document loadedpayroll.xlsx, correct?

A. Yes.

Q. And that would be the payroll document that you found with your colleagues' pay included in that document; is that correct?

A. Yes.

* * *

Q. And as you can see in these three pages, Mr. Definis, the second column is the date modified. Is it your understanding that date that is included in that column is the last -- the date that each of those documents were modified? Would you agree with that?

A. Either modified or accessed, I'm guessing.

(Tr. pp. 270:2-271:3; Resp. Ex. 19, RESP0102-0104). Incredibly, despite Andrew Definis' claim that he was searching for the most recent information on the Cunningham Project to get caught up to speed, he did not look to the "date modified" column to see that no documents had been modified any time after June 2019. Additionally, he was inconsistent with respect to his alleged legitimate reasons for searching through the Cunningham iDeals Back Up folder:

Q. And if you reviewed the dates in that column, Mr. Definis, you would notice that the last, most recent date in that column is June 12, 2019….You would agree that that's almost 6 months before you found the payroll document in December, correct?

A. Sorry, I'm trying to zoom in on this….Could you ask your question one more time, sir?...

Q. You would agree that June 12, 2019 was almost 6 months prior to the date on which you allegedly found the payroll document in that folder, correct?

A. Yes.

Q. And you would agree that those modified dates were available to you as you were looking through that folder in early December 2019, correct?

A. The column of date modified would be visible, yes.

Q. And so, when you're looking at this at a glance, you would readily notice that all the documents in this folder were at least 6 months old, correct?

A. **Well, I wasn't ever looking for the date modified. I would be looking for the data that is required to complete the -- do my job. It wouldn't necessarily be -- like, there could be a document that you need that is 2 years old and it can still be relevant to the project.**

(Tr. 271:16-272:21) (emphasis added).

The General Counsel will also argue that Charging Parties had wide latitude to work as they saw fit and were being proactive because Respondent relied heavily upon them to deliver information at a moment's notice. However, Josh Myers testified that he did not rely on Charging Parties for their knowledge of any information that was stored for a specific project. (Tr. pp. 487:25-488:2). Further, Myers regularly counseled his team on what work *not* to do at any given point, and did not assign open-ended tasks to Charging Parties. (Tr. pp. 485:13-486:7; 502:21-24). The picture that Charging Parties attempt to paint through their testimony, that individuals with decades of experience in the financial services industry would rely so heavily on two entry-level employees with a total of six months of experience in the industry and give them carte blanche to operate in whatever manner they see fit, is simply unfathomable.

Lastly, Respondent utilized its IT team to conduct a search of Charging Parties' Microsoft Outlook accounts after the termination, which uncovered chat messages that evidence that Charging Parties were engaged in exactly the misconduct Respondent believed. On December 1, 2019, at 12:04 a.m., Andrew Definis sent Nicholas a spreadsheet breaking down Vesta's internal expenses. (Resp. Ex. 9, RESP0049). A little over two hours later, Nicholas messaged Andrew at 2:22 a.m., stating, "I got all this stuff! Don't know where to put it, but I got shit. Good shit." (Resp. Ex. 8, RESP0033). These messages point directly to Charging Parties' clandestine search for confidential information. Charging Parties' commitment to secrecy was further exhibited by the fact that Andrew Definis, upon locating the payroll document on December 3, 2019, silently shared the document with Nicholas rather than verbally telling him about the location of the document, despite the fact that they sat directly across from one another in their work space. (Tr. p. 397:6-13).

The weight of the evidence points toward Charging Parties' misconduct. Accordingly, the General Counsel cannot establish that Respondent's reasons for terminating Charging Parties' employment was pretextual.

2. The General Counsel Has Failed to Establish Pretext Due to Respondent's Purported Insufficient Investigation of Charging Parties' Misconduct.

The General Counsel will attempt to argue that Respondent's reasons for terminating Charging Parties' employment are pretextual because it did not interview Charging Parties prior to their discharge. However, an employer's failure to investigate misconduct in a *specific* way does not undermine its good-faith belief that the employee engaged in the misconduct. The employer is not required to investigate in any particular manner, especially if the General Counsel cannot show any evidence that would have been uncovered with a deeper investigation. *Sutter East Bay Hosps.*, 687 F.3d at 436 (citing *Detroit Newspaper Agency v. N.L.R.B.*, 435 F.3d 302, 310 (D.C. Cir. 2006)).

The record evidence shows that Respondent did not take actions without careful consideration. Both Josh Coleman and Tom Povedano independently went through the process of locating Justin Coleman's personal files deep within the Cunningham iDeals Backup file. (Tr. p. 607: 24-25; 620:19-20; Resp. Ex. 10; Resp. Ex. 19). Further, Respondent's management team met on two separate occasions, December 5 and 6, to determine whether there was any misconduct and what action Respondent should take in response to the misconduct. (Tr. pp. 517:18-519:20; 520:10-521:14). Additionally, because of the unique risk Charging Parties posed, and the perceived data breach at hand, Respondent made the affirmative decision not to engage with Charging Parties during the investigation so as not to tip Charging Parties off and risk them moving any confidential data off of company-owned devices where Respondent could no longer lock it

down. (Tr. p. 621:4-19). Under these circumstances, Respondent made the logical decision not to interview Charging Parties.

In addition, the General Counsel cannot point to any evidence beneficial to Charging Parties that Respondent would have uncovered with a deeper investigation. Charging Parties' testimony on the record is that they found the personal documents while in the midst of a "deep dive" into the Cunningham Project at the behest of Josh Myers and Bill Coleman. However, there are no emails, text messages, or other communications in the record demonstrating that Josh Myers or Bill Coleman instructed them to take any action on the Cunningham Project other than one isolated ask on November 4, 2019. Further, Josh Myers was involved in each step of the investigation, in both management meetings, and in the termination meeting, and would have countered Charging Parties' self-serving accounts with the truth of the matter -- that he did not instruct Charging Parties to take any action at that point in time and, in fact, specifically instructed them *not* to. It is also undisputed that Bill Coleman never served as Charging Parties' direct or indirect manager, and thus would not have been in a position to instruct Charging Parties to take any specific action.

Frankly, had Respondent made a deeper investigation into Charging Parties' communications prior to terminating their employment, it would have found even more damning evidence. Indeed, as already stated above, subsequent to its termination of Charging Parties' employment, Respondent searched Charging Parties' Microsoft Outlook accounts and discovered numerous messages and emails between the brothers that indicate that they were searching for confidential information at least as early as December 1, 2019. On that day, at 12:04 a.m., Andrew Definis sent Nicholas a spreadsheet breaking down Vesta's internal expenses. (Resp. Ex. 9, RESP0049). A little over two hours later, Nicholas messaged Andrew at 2:22 a.m., stating, "I got

all this stuff! Don't know where to put it, but I got shit. Good shit." (Resp. Ex. 8, RESP0033). At the hearing, Nicholas Definis provided an unconvincing, rambling justification for his message to Andrew, stating that he was referring to templates and "waterfall models"—documents Nicholas admits that he and Andrew regularly saved to the SharePoint system—stating that it was "not to imply secrecy" and later calling it "the way that your brother and you communicate." (Tr. pp. 382:9-386:16).

Consequently, the General Counsel cannot point to Respondent's investigation of Charging Parties as evidence of pretext.

3. The General Counsel Has Failed to Establish Pretext Based on Any Alleged Inconsistency in Respondent's Reasons For Terminating Charging Parties' Employment.

Based on its questioning and admitted exhibits at the hearing, it is anticipated that the General Counsel will argue, unconvincingly, that Respondent provided inconsistent reasons for the termination of Charging Parties. The General Counsel will rely heavily on a statement Josh Myers made at Andrew Definis' unemployment compensation hearing that access was not the crux of why Respondent terminated Charging Parties' employment. At the hearing in this matter, Nicholas Definis testified that Charging Parties were told in the termination meeting that access was not the reason for their discharge, but that it was what they did with that access. The General Counsel will attempt to argue that these statements are inconsistent with Respondent's current position and are evidence that Respondent has shifted its rationale for the termination.

However, Nicholas Definis' testimony is inconsistent, providing one moment that Sagar Dalal made the statement, and in the next moment that it was Josh Myers instead. (Tr. pp. 328:11-13; 336:16-24). Both of these claims are inconsequential. First, Sagar Dalal has testified multiple times under oath that he was not present during the management meeting in which the decision to

discharge Charging Parties was made. (Tr. pp. 450:9-11; 453:7; GC Ex. 7 and 8). He also testified that he was not privy to the reasons for the discharge. (Tr. p. 453:23-454:2). Second, Charging Parties admit that Josh Myers read from a script during the discharge meeting, and the script speaks for itself – the rationale set forth on the script is clear that Charging Parties' search for information was the driving force behind management's decision. (Tr. p. 115:20-21; Resp. Ex. 14).

Moreover, where the General Counsel attempts to frame Josh Myers' statements at the unemployment compensation hearings as evidence of Respondent's shifting motivations for terminating Charging Parties' employment, they are anything but. It is undisputed that the Charging Parties had access to Respondent's SharePoint for the Cunningham Project. (Tr. pp. 556:24-557:6). As Josh Myers testified at hearing, it was Charging Parties' use of that access to embark on a fishing expedition into confidential documents which were unrelated to their normal employment that breached Respondent's trust. Myers testified:

> Q. Okay, and if I could go through number one, you gained access to information you should not have. Can you explain that?
>
> A. Again you're in the SharePoint, you're in Cunningham, you're in a zip folder, and it goes multiple layers down to where it's clearly not Cunningham anymore.
>
> Q. Okay. How about what you did with the information?
>
> A. More of the same….once you cross that line of, I'm here doing work for Cunningham, or I'm here for trying to find information. So it was, again, going into a zip, downloading it, expanding it, going multiple layers in, going into files that were clearly marked not anything to do with Cunningham.

(Tr. p. 572:10-23). Thus, Myers' statement that it was not about the access is not at all inconsistent with Respondent's reasons for terminating Charging Parties' employment and is not evidence of pretext. Charging Parties had access to the Cunningham SharePoint, which was not an issue. However, as Josh Myers has now explained under oath on three separate occasions, Charging Parties using their access to dig for confidential information was the breach of Respondent's trust.

As he testified at hearing, "it's walking into the office, opening the drawers, rooting through the files." Thus, Respondent has been consistent that Charging Parties' access to the Cunningham SharePoint was *not* the issue, much the same as an employee's access to an office space may not be an issue. But, once that access is used to search through drawers and files for confidential information, then an employer is right to take issue with how the employee has used that access.

Consequently, the General Counsel has not established pretext, and thus the Consolidated Amended Complaint should be dismissed.

E. Charging Parties Provided Incredible Testimony.

Throughout the course of the hearing, Charging Parties provided inconsistent testimony and other testimony that lacks all credibility. To the extent issues of credibility factor into the decision in this matter, Charging Parties' testimony in its entirety should be weighed, in addition to and/or as further support for any credibility issues already addressed above, in light of the following incredible lines of testimony:

1. Charging Parties Deny Receiving the Compliance Manual.

Both Charging Parties testify that they were never given a copy of the Compliance Manual. (Tr. pp. 292:22-25; 314:8-16). They maintained this untenable position despite also acknowledging that they each signed a written acknowledgment that they received, reviewed, and would abide by the terms of the Compliance Manual. (Resp. Ex. 3). Furthermore, it is clear from the record that Respondent provided Charging Parties a copy of the Compliance Manual on May 15, 2019. (Resp. Ex. 21).

2. Charging Parties Claim to Have Had Wide Latitude to Complete Their Work as They Saw Fit.

Charging Parties claim Respondent afforded them wide latitude and independence to complete their tasks as they saw fit. (Tr. pp. 297:17-20; 387:15-24). However, it is uncontroverted

that neither Charging Party had meaningful experience in the financial services industry prior to Respondent hiring them, let alone enough experience for Respondent to give them open-ended tasks with little oversight. Andrew Definis had only six months experience in the financial services industry prior to Respondent hiring him. (Tr. pp. 136:18-137:4). Nicholas Definis never worked in the industry prior to his tenure with Respondent. (Tr. pp. 340:17-341:8). It is also uncontroverted that Respondent devoted Charging Parties' early employment on familiarizing them with the industry. (Tr. pp. 141:20-142:6).

3. Andrew Definis' Testimony Concerning Finding the Payroll Document.

Andrew Definis testified that he came across the confidential files on December 3, 2019 while completing a deep dive into the Cunningham Project at the behest of Josh Myers and Bill Coleman and that he was looking for the most recent information related to the project. (Tr. pp. 97:22-98:2, 202:13-17). However, it is undisputed that on December 3, the Charging Parties, and everyone else working for Respondent, was preoccupied with the Strata Project, which was, as Andrew swore in his affidavit, "in the final hours." (Tr. pp. 265:24-266:2). As Nicholas Definis described that day's focus on the Strata Project, "you're under the gun, you kind of pressure to make sure it's correct and to get it out the door." (Tr. p. 323:21-23). It is simply unbelievable that Andrew Definis would take time away from a project, on which he and Nicholas worked all year and on which they were going to present, in order to dig into a project that had ceased all work six months prior. (Tr. p. 323:13-20). Indeed, despite the fact that Charging Parties sat directly across from one another in the same room, Andrew Definis chose to clandestinely send the document to Nicholas rather than verbally telling Nicholas about the document's presence on the system. (Tr. p. 397:6-13).

Moreover, while Andrew claims to have been searching for the most recent information related to Cunningham when he downloaded the Cunningham iDeals Back Up zip folder, he was well aware of the fact that Respondent only maintained documents on iDeals to preserve documents for the Cunningham litigation. (Tr. p. 267:3-16). Indeed, Andrew Definis himself uploaded documents to the iDeals platform, the last of which around June 3. (Tr. p. 267:15-23). Andrew Definis also admitted the files contained within the Justin Coleman zip folder, where he found the confidential payroll document and Justin Coleman's personal files, have a column labeled "date modified," and that the most recent date modified for the files within the zip folder was from June 12, 2019. (Tr. pp. 270:23-272:13; Resp. Ex. 19, RESP102-04). He further admitted that he "wasn't ever looking for the date modified," though it would have clued him into the recency of the files. (Tr. p. 272:17). Instead, he directly contradicted his proffered explanation for why he was conducting his search -- searching for the most recent information -- by stating "there could be a document that you need that is two years old and it can still be relevant to a project." (Tr. p. 272:17-22). Simply put, Andrew Definis' explanation for searching through the Cunningham SharePoint, and the timing of his search, lacks all credibility.

4. Charging Parties' Reasoning for Not Notifying Respondent About the Misplaced Documents.

In his affidavit to the Board, Andrew Definis swears under oath that at the time he found the confidential information on the Cunningham SharePoint that, "because we were in the final hours of another deal we were working on, *we did not have time to address it with anyone that day.*" (Tr. p. 265:22-24) (emphasis added). However, Andrew Definis found the confidential payroll document by 3:06 p.m. on December 3, 2019, which is the time he messaged a screenshot of the document to Nicholas Definis. (Resp. Ex. 9). Andrew Definis also had time to send Nicholas the file path to find the documents just twenty minutes later, at 3:27 p.m. (Resp. Ex. 9). Charging Parties worked typical 9:00 a.m. to 5:00 p.m. hours when in the office. (Tr. p. 296:20-24). Yet, in the two hours between Andrew Definis sharing the document with Nicholas, and the end of Charging Parties' typical workday, neither contacted anyone from Respondent to advise of the confidential documents.

Charging Parties did not reach out to anyone from Respondent until around 8:45 p.m. that night when Nicholas Definis sent a message to Josh Myers to discuss pay, merely alluding to "additional items that have warranted [their] attention." (Resp. Ex. 8). Nicholas Definis attempts to attribute this gap in time to his four-hour nap that he took after work that day. (Tr. pp. 406:18-407:3). This testimony itself contradicts Nicholas' prior assertions that he actually messaged Josh Myers around 7:00 p.m., which could not have happened if he had taken a four-hour nap after work as he later claimed. (Tr. p. 403:3-6).

Moreover, Charging Parties had at least three different modes of communication for Justin Coleman, including his cell phone, email, and Microsoft Teams messaging, yet did not contact him until 18 hours after Andrew shared the payroll document with Nicholas. (Tr. pp. 287:18-288:8; Resp. Ex. 8). Andrew Definis attempted to explain away the gap in time by testifying that

he actually contacted Justin Coleman to advise that his personal documents—not the payroll document—were on the Cunningham SharePoint, and that the personal documents were found later in time than the payroll document. (Tr. pp. 276:14-277:12, 283:9-12). However, this testimony contradicts the sworn testimony provided in Charging Parties' affidavits to the Board, which stated that they were informing Justin Coleman that there was a payroll document on the system that should not have been, and that they were delayed in notifying him due to being busy with another project. (Tr. pp. 365:17-366:2, 402:18-23, 407:4-13).

5. Andrew Definis' Claim Not to Know Whether the Payroll Document Was Properly Stored in the Cunningham SharePoint.

Andrew Definis testified that he did not know whether the payroll document should or should not have been in the system. (Tr. p. 276:10). However, in his affidavit, he specifically states that he found the payroll document and immediately shared with his brother, but did not have the time to address with anyone else at that time. (Tr. 265:17-24). The next day, Andrew addresses the documents with Justin Coleman, specifically stating that there were documents "on the cunningham sharepoint [sic] *that should not be on there*." (Resp. Ex. 8) (emphasis added). Accordingly, it is clear from Andrew's affidavit and the exhibits that, despite his later testimony, he knew at the time of discovering the payroll document, and knew when making his sworn statement to the Board, that the document should not have been on the Cunningham SharePoint.

6. Charging Parties' Claim That the Cunningham iDeals Back Up Zip File Was on the "Front Page" of SharePoint.

Charging Parties testified at hearing that the Cunningham iDeals Back Up file was "on the front page" of the Cunningham SharePoint. (Tr. pp. 196:11-21, 321:7-13). However, around 3:27 p.m. on December 3, 2019, Andrew Definis sent to Nicholas the file path to locate the zip files on the Cunningham SharePoint. (Resp. Ex. 8). There would be no need for Andrew to send Nicholas

this file path if the Cunningham iDeals Back Up file was on the front page, as Charging Parties claim. The location of the file would have been apparent. Andrew Definis attempted to clean up this inconsistency in his testimony by adding that he actually sent that screenshot to "document that it was on a public SharePoint." (Tr. p. 196:6-9). However, this explanation is unconvincing for the same reason. If the document were on the "front page" of the Cunningham SharePoint as Charging Parties claim, it would have been apparent that the document was on a public SharePoint and Andrew Definis would have no need to send the specific file path to Nicholas.

7. Charging Parties Claim to Have Informed Justin Coleman That His Personal Documents Were In the Cunningham SharePoint.

Charging Parties, in an effort to deny that they knew the loaded payroll document did not belong on the SharePoint, testified that their communication to Justin Coleman informing him about the presence of his files in the Cunningham SharePoint referred to his personal files, including the agreement of sale to Justin Coleman's home, and *not* the loaded payroll document. (Tr. pp. 276:14-279:12). However, it is undisputed that Charging Parties' communication to Justin Coleman never specifies the files improperly placed in the SharePoint. (Resp. Ex. 9, RESP0035). Additionally, Charging Parties' board affidavits *specifically* refer to the loaded payroll document as the information that should not have been on the SharePoint. (Tr. pp. 401:10-22; 407:4-13). In fact, these sworn statements from Charging Parties' affidavits led the General Counsel to state, in its opening statement, that Charging Parties "informed Respondent that there was a document -- *a payroll document* in the wrong place." (Tr. p. 49:3-4) (emphasis added).

8. Nicholas Definis Asserts That a Number of Written Documents Have Been Doctored or Are Inaccurate.

On several occasions through the course of his testimony, Nicholas Definis baselessly asserted that documents were altered, produced out of context, or inaccurately reflected his

statements despite signing and acknowledging their truthfulness. Aside from his claim that his signed acknowledgment of receipt of the Compliance Manual was inaccurate, Nicholas Definis also alleged that his sworn affidavit to the Board was also inaccurate despite signing the affidavit and swearing to its accuracy under penalty of perjury. (Tr. pp. 404:1-406:8).

When testifying about Charging Parties' October 13 pay discussion with Josh Myers, Nicholas Definis asserted that Respondent's Exhibit 6 was altered because the phrase "I promise" was excluded. (Tr. pp. 363:12-366:10). Respondent subpoenaed Charging Parties and requested that they produce any and all communications related to their claims, and Nicholas Definis failed to produce any communications that would support his claim that Respondent's Exhibit 6 was altered or incomplete in any way.

Nicholas Definis further testified that he did not recognize a message sent from his work account to Andrew Definis on December 1, 2019, to be a message he sent because of the profane language used in the message. (Tr. pp. 316:4-20; 382:9-383:1; Respondent's Exhibit 8, RESP0033). In spite of this, Nicholas goes on to testify, unconvincingly, as to what documents or information the message referenced. While Nicholas' message to Andrew states that he has "good shit" that he does not know where to put, he made a rambling, wholly incredible claim that this was simply slang between brothers, that he was referencing educational models or documents that Charging Parties would otherwise simply save to Respondent's SharePoint, and "wasn't to imply, like, secrecy or anything like that." (Tr. pp. 383:1-386:16).

Nicholas Definis also testified that Charging Parties sent text messages to Justin Coleman informing him specifically which folder contained the misplaced personal information. (Tr. p. 415:19-25). Again, despite being served with a subpoena *duces tecum*, Nicholas Definis did not

produce any text message supporting his assertion, and the General Counsel denied having any such text messages in its possession. (Tr. p. 416:1-417:23).

III. CONCLUSION

All signs point to Charging Parties' misconduct. Andrew Definis was digging through a file that he knew was created for litigation purposes and at a time that he knew everyone else was consumed with the Strata Project. He shared that information with Nicholas Definis, but did not notify any other member of Respondent's team despite finding the document in the middle of a workday. In fact, Charging Parties' first action was to reach out to Josh Myer hours later to discuss their compensation. Notably, they did not tell Josh Myers that they found payroll information located on the system, or that there were personal documents belonging to the Coleman Family on the system. Despite having Justin Coleman's email address, cell number, and Microsoft Teams Chat contact, Charging Parties did not contact Justin Coleman about the misplaced documents for eighteen hours, and once they did communicate with Justin Coleman, they were secretive and evasive about what documents were on the system and where. Once Respondent discovered exactly what Charging Parties had found on the system and the lengths they had to go to find the document in the first place, Respondent lost all trust in Charging Parties' ability, or willingness, to conduct themselves responsibly with respect to client information and in accordance with the compliance manual.

Charging Parties claim they did not commit any misconduct; but, in these circumstances, whether the misconduct actually occurred is irrelevant. Respondent had a good faith belief that Charging Parties engaged in misconduct that was egregious enough in nature to warrant the termination of their employment. The weight of the evidence demonstrates that it is for that reason, and that reason alone, that Respondent terminated Charging Parties' employment.

The General Counsel has failed to adduce evidence sufficient to prove any of the allegations in the Consolidated Amended Complaint. Respondent's conduct comported with established precedent, and in no way violated employees' rights as afforded by the Act. As such, the Amended Consolidated Complaint against Respondent should be dismissed in its entirety.

Respectfully submitted,

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Dated: July 23, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2021, I served a copy of the foregoing Post-hearing Brief by electronic filing and U.S. Mail to:

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